U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: March 6, 2000
Case No. 1999 INA 0249

In the Matter of:

MR. & MRS. THOMAS LAWSON, Employer

on behalf of

EWA MARIA GAWAD, Alien

Appearance: R. J. Gaynor, Esq., of Boston, Massachusetts, for Employer and Alien
Certifying Officer: Hon. R. A. Lopez, Region I.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of EWA MARIA GAWAD ("Alien") by MR. & MRS. THOMAS LAWSON ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U. S. C. § 1182(a) (5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at Boston, Massachusetts, denied the application, Employer requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

(1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On September 18, 1997, the Employer applied for alien labor certification to hire the Alien to fill the position of "Live-In domestic" in their household. The Employer described the Job as follows:

> General household management will include cooking, shopping, doing laundry, cleaning dishes and child care.

AF 36.[3] The position was classified under DOT Occupation Code No. 301.474-010 as a Live-In Domestic.[4] Employer stated no educational requirement and did not require experience in the Job Offered. The Application stated a forty hour work week from 7:00 AM to 11:00 AM, and 6:00 P.M. to 10:00 P.M., at $261.00 per week, with no provision for overtime.[5] Although one well

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]On June 17, 1997, the Employer and the Alien entered into an agreement the terms of which were substantially the same as the Application, subject to the following exceptions. The weekly salary was $210, and an hourly rate of $5.25 was established. Overtime work was to be paid at an hourly rate of $7.88. The Alien would have a private room and board at the home of the Employer at no additional cost. No period of employment was stated; but either party was to give two weeks' notice before terminating the employment.

[4]**301.474-010 HOUSE WORKER, GENERAL** (domestic ser.) alternate titles: housekeeper, home Performs any combination of following duties to maintain private home clean and orderly, to cook and serve meals, and to render personal services to family members: Plans meals and purchases foodstuffs and household supplies. Prepares and cooks vegetables, meats and other foods according to employer's instructions or following own methods. Serves meals and refreshments. Washes dishes and cleans silverware. Oversees activities of children, assisting them in dressing and bathing. Cleans furnishings, floors, and windows, using vacuum cleaner, mops, broom, cloths, and cleaning solutions. Changes linens and makes beds. Washes linens and other garments by hand or machine, and mends and irons clothing, linens, and other household articles, using hand iron or electric ironer. Answers telephone and doorbell. Feeds pets. *GOE: 05.12.18 STRENGTH: M GED: R3 M2 L2 SVP: 3 DLU: 86*

[5]A National of Poland, at the time of Application the Alien was living and working in the Job Offered at the home of the Employer under authority of a B-2 visa. She was born in 1948 and was a graduate of Lagiellonia University in Krakon, where she was awarded a Masters Degree in Literature in 1972. The Employer hired the Alien in December 1993.
AF 38-39.

qualified U.S. worker applied for the position, the Employer rejected her.[6]

Notice of Findings. Subject to rebuttal, the CO denied certification in the Notice of Findings ("NOF") issued on February 9, 1999. AF 14-15. In explaining the reasons for the denial of certification, the NOF said that 20 CFR § 656.21(b)(2)(iii) provides that, if the position involves a requirement that the employee live on the employer's premises, the employer shall document adequately that this requirement is a business necessity.

> The requirement that the worker live on the premises is unduly restrictive since it is not recognized by the Dictionary of Occupational Titles as a normal and valid requirement for a houseworker or child monitor. There is no mention in the DOT that the duties associated with the position must be, or normally are performed on a live-in basis. In order for a job requirement, or set of requirements to qualify as arising from business necessity, an employer must demonstrate by sufficient documentation that because of the peculiar circumstances of his particular case, the duties described can only be performed on a live-in basis thereby making the restrictive requirement a "business necessity." Documentation must include specific circumstances where required business travel and long or erratic work schedules require excessive absence from the home. The mere showing of working parents with young children at home does not alone establish the need for a live-in worker since alternatives usually exist.

The NOF added that the employer must provide sufficient documentation to show that failure to entertain clients would undermine the employer's business or that suitable workable alternatives do not exist. AF 15. Finally, the NOF said that the hours of duty specified in the contract, 7:00 A.M., to 11:00 A.M., and 6:00 P.M., to 10:00 P.M., are not standard hours for this occupation, and directed the Employer to document the need for the split shift and the reasons that the job duties cannot be performed by a live-out worker. *Id*.

Rebuttal. The Employer's rebuttal of March 4, 1999, consisted of a cover letter by counsel, a statement by the Employer, a corroborating statement by Mr. Lawson's supervisor, and a schedule of Mr. Lawson's work hours for the fourth quarter of 1998. AF 08-13. Employer said Mr. Lawson was an advertising agency executive whose work involved extensive travel, long workdays, six-day workweeks, and unpredictable demands on his time. Mrs. Lawson said her work consisted of assisting her husband at evening meetings outside the house, preparation of documents he used in his presentations, and the evening and weekend entertaining of clients, some of which required overnight travel to other cities. Citing unpredictable vocational demands, the need for a responsible adult to be available to care for their daughter and son, the increasing

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[6]The Employer's reasons for ejecting Ms. McCann were, "Upon careful review of Ms. McCann's resume it became apparent that she is not qualified for the position. She has only a minimal amount of cooking experience. Cooking is a vital part of the position for we host many occupational related functions at my home for my husband." AF 19, and see AF 22-23. As the CO did not consider the Employer's reasons for rejecting this U. S. worker to be a reason for rejecting this application in the Notice of Findings, the rejection of this U. S. worker is not an issue before BALCA, even though the Employer's recruitment report was clearly inconsistent with the Application criteria.

demands of her husband's business, and the greater pressure on this couple to meet their financial obligations, she concluded that the only way they could meet the obligations of Mr. Lawson's employment was to have a live-in domestic.[7] Mrs. Lawson said that she was unsuccessful in finding a worker who could meet their time requirements on a live-out basis. AF 09. After discussing the nature of his job duties at the advertising agency, the statement by Mr. Lawson's supervisor explained that Mrs. Lawson was previously a senior advertising executive who often accompanied her husband to business functions that involved client wives. This included attending industry conventions and client multi-day planning meetings away from home and her availability to respond to personal invitations from clients to attend functions tangential to the day to day business. AF 11.

Final Determination. On March 24, 1999, the CO denied certification in a Final Determination, rejecting the Employer's rebuttal on grounds that it failed to sustain the burden of proving the business necessity of a live-in worker. Again noting that the DOT description of this occupation does not indicate that the duties of either a houseworker or a child monitor are normally performed on a live-in basis, the CO reiterated that, "The mere showing of working parents with young children at home does not alone establish the need for a live-in worker since alternatives usually exist. The term 'business necessity' as it relates to household workers means that the employer's household could not function adequately and that the needs of the family could not be met without a live-in houseworker." While summing up the NOF, the CO also address the rebuttal evidence, including the exhibit that showed Mr. Lawson's schedule for the last three months in 1998. The CO again explained that,

> Documentation to establish "business necessity" should include, but is not limited to a statement from the employer setting forth work and travel schedules for both parents as well as a calendar of business activities for the past three months requiring any business travel and long or erratic work hours requiring excessive absence from home. Business necessity has been found to include care for young children and the home where both parents clearly document specific circumstances where required business travel, long or erratic schedules require excessive absence from the home. Absent specific evidence of the employer's work status, respective places of employment, occupational work schedules and work demands, including travel required by both parents, there is no showing that a business necessity for child care exists.

AF 05. Addressing the rebuttal statement by Mrs. Lawson, the CO observed that, "It is contended by the employer that the only way they are able to meet their obligations is by having a live-in domestic." The Final Determination concluded that the rebuttal evidence failed to convince the CO that the Employer's live-in requirement arose out of business necessity or that the needs of their household could not be met by other means, adding, .

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[7] Mr. Lawson is the Chief Operating Officer of Arnold Communications, an advertising agency whose largest accounts are McDonald's and Volkswagen. His duties involve dealing with owner/operators' advertising cooperatives of McDonald's franchisees and Volkswagen dealers in markets that extend across the U. S. and Canada. AF 11.

> While the employer's letter appears to be a plausible description of their domestic routine, it has not been sufficiently demonstrated that the job opportunity for which certification is sought can only be performed on a live-in basis. It would appear that the duties associated with the position can be performed on a live-out basis with occasional child-care being arranged when required.

AF 06.

Appeal. Employer appealed on April 21, 1999.

DISCUSSION

Burden of proof. The factual findings of the CO will be affirmed, if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. **Haddad**, 96 INA 001 (Sep. 18, 1997). In all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification. The imposition of the burden of proof in this case is based on the fact that labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market.[8] 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification:

> "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

Consequently, the Panel must strictly construe this exception, and must resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

Analysis and conclusion. The argument in Employer's appellate brief focused on the business necessity of a live-in "domestic worker" that was preserved as an issue by CO in the Final Determination. Employer's rebuttal stated Mr. Lawson's work schedule during a three month period, which included about sixty working days. On twenty-six days, Mr. Lawson

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[8] See generally 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification").

traveled to his office in downtown Boston. Of the eighteen trips to New York, five were clearly day trips, as were the trips to Hartford, Milwaukee, and Baltimore. Two out of the four trips to Philadelphia were day trips, while other trips to Philadelphia-Harrisburg, New York, New York-Washington, Chicago, and Los Angeles apparently required him to spend periods of two, three, and four days away from home. During this period, Mr. Lawson had surgery requiring two days in Boston, a five day vacation, and holidays covering periods of five days for Thanksgiving and nine days for a Christmas-New Year hiatus. AF 12-13.

Neither the statements by Mrs. Lawson and Mr. Eskandarian, Mr. Lawson's superior at Arnold Communications, nor Mr. Lawson's work schedule identified the dates when Mrs. Lawson joined Mr. Lawson on the business trips listed. Moreover, Mr. Eskandarian did not corroborate Mrs. Lawson's assertion that her presence was required by Mr. Lawson's work on all of those trips. Instead, noting that Mrs. Lawson was previously a senior advertising executive who often accompanied her husband to business functions that involved client wives, he said only that her presence was of value on occasions when their joint social interaction with husbands and wives representing the agency's clients was the paramount consideration. It is significant that Mr. Eskandarian did not confirm Mrs. Lawson's claim that Mr. Lawson's work required her involvement an any aspect of his professional presentations to the advertising agency's clients. For this reason it is inferred that, although some of Mrs. Lawson's travel with Mr Lawson on business trips for his employer may have been necessary for his business career, the remainder was not. The actual proportion of such joint travel that Mr. Lawson's work required remains undetermined, based on the evidence of record. Finally, while it appears that the fourth quarter of 1998 required Mr. Lawson to carry out a busy travel schedule, there is no evidence that this level of velocity was typical of the previous three quarters of 1998, that this was the pattern of travel in his previous years as an employee of this advertising agency, that the volume of business travel would continue in 1999 and later years, or that Mr. Lawson's work would require the presence of Mrs. Lawson on any or all of his future business trips.

For these reasons, Mrs. Lawson's contention that a live-in domestic worker was a business necessity for this household is not credible, as the extent of Employer's need for this unduly restrictive requirement is unproven. It follows that the record contained insufficient evidence to support certification, and Employer's requirement for a live in domestic worker appears to have arisen from their preference and personal convenience and not from business necessity.

Accordingly, the following order will enter.

ORDER

The denial of alien labor certification by Certifying Officer is hereby affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.